



No. 90-1014

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. LEE, ET AL.,
v.
Petitioners,
DANIEL WEISMAN, ETC.
Respondent.

On Writ of Certiorari to the United States
Court of Appeals For the First Circuit

**BRIEF AMICUS CURIAE OF THE STATE OF
DELAWARE IN SUPPORT OF PETITIONERS**

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*Del. Code Ann. tit. 14,
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*Declaration of Rights and
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*H.R.J. Res. 4, 136th Gen.
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OTHER AUTHORITIES

*2 H. Conrad, History of the State
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*The Ephemera Collection
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*A. Fink, Evaluation of
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*C. Hoffecker, Delaware A
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*M. Kane, The Development of
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*Letter of the Trustees of
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*W. Powell, History of Delaware
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*A Warrant from Thomas Penn to
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*J. Whitehead, The Rights of
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INTEREST OF AMICUS CURIAE

The State of Delaware has a significant
interest in this case. Delaware, like Rhode
Island, is charged by its state law with the
obligation to provide primary and secondary
education for its citizens. Del. Const.
art. X, §1. For more than 150 years, many
of Delaware's local school boards have

permitted, but not required, prayer in public school graduation ceremonies.

Delaware is both proud and mindful of the obligations imposed upon it by virtue of being one of the founding states. Indeed, that is reflected in its self-selected reference to being the "First State" to adopt the United States Constitution. Of particular application here is that Delaware has a unique, rich and diverse history of the coexistence of religion and government.

Although like ancient Attica, Delaware is territorially insignificant, yet like that classic land of noblest deeds, her soil has been the scene of many notable events, not only of local or state interest, but also of national concern and importance. More especially is this true of her contribution to the religious department of our national history. It is safe to say that no other of the thirteen original states witnessed the rise and early development of so many religious bodies.

Rhode Island may be called the early American home of the Friends, and Maryland of the Catholic Church, Virginia of Episcopalianism, New York of the Dutch Church, and Massa-

chusetts of Congregationalism; but it is a more note-worthy circumstance, that within the limited boundaries of Delaware, is to be sought the origin, and in part, the development in America of three religious denominations, viz., the Lutheran, the Presbyterian and the Methodist, and the founding of a fourth, the "Union Church of African Members," the first church in the United States organized and controlled wholly by colored persons. Its founder and first bishop, Peter Spencer, was born in this State, as also was the founder and first bishop of the Reformed Episcopal Church, David George Cummins; and the first Methodist bishop, who was a son of a Methodist preacher, Levi Scott.

² H. Conrad, *History of the State of Delaware* 745 (1908). Delaware's unique historical perspective of great religious pluralism can be offered by no other state.

Prayer and religion are as much an unchangeable part of the history of the people of Delaware as is our constitutional government. This case provides an opportunity for thoughtful review of the constitutional standards for prayer at public school graduation ceremonies in the context of

preserving the coexistence of religion and government in Delaware and other states.

Delaware's General Assembly is sensitive to the proper need to avoid government establishment respecting religion. Indeed, such sensitivity is required not only by the first amendment to the United States Constitution, but by Delaware's state constitutional history as well.¹

¹ The Declaration of Rights and Fundamental Rules of the Delaware State enacted prior to the Bill of Rights on September 11, 1776 provided in Section 2:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

Subsequently, Section 3 provided, "That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or
(continued...)

Delaware believes that an invocation or benediction at a public school graduation ceremony can be appropriate without violating the first amendment to the United States Constitution. The House of Representatives and the Senate of the 136th General

¹(...continued)
safety of society."

Article I, Section 1 of the Constitution of the State of Delaware adopted in 1792 provided:

Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe; and piety and morality, on which the prosperity of the communities depends, are thereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.

The language of Article I, Section 1 of the Delaware Constitution of 1792 survived in the Delaware Constitutions of 1831 and 1897 except that the Constitution of 1897, Article I, Section 1, refers to "Almighty God" instead of "the Author of the universe."

Assembly of the State of Delaware, with the concurrence of the Governor, adopted a joint resolution in April, 1991 by the aggregate vote of fifty-nine affirmative, one negative and two abstentions supporting the right to have a benediction and invocation at public school graduation ceremonies and formally requesting the presentation of such position in an *amicus* brief in this case. H.R.J. Res. 4, 136th Gen. Assembly (1991).

STATEMENT OF FACTS

Amicus Curiae adopts by reference the statement of facts set forth in Petitioners' Brief filed with this Court.

SUMMARY OF ARGUMENT

Prayer delivered by private individuals at public school graduation ceremonies is constitutional. The practice is not a product of affirmative governmental involvement; rather, it originated with the people.

Graduation prayer is as deeply entrenched in our national heritage as the prayer permitted in our legislative bodies.

By allowing the practice of graduation prayer to continue, state governments comply with the constitutional mandate that religious practices be accommodated. Graduation prayer does not implicate the evils against which the establishment clause protects or otherwise offend the Constitution.

ARGUMENT

I. AN INVOCATION OR BENEDICTION DELIVERED BY PRIVATE INDIVIDUALS AT PUBLIC SCHOOL GRADUATION CEREMONIES IS CONSTITUTIONAL UNDER EITHER THE LEMON OR MARSH ANALYSIS.

A. Introduction.

This Court has frequently observed the importance of historical practice in determining the constitutionality of conduct under the Establishment Clause of the first amendment. *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086

(1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Zorach v. Clauson*, 343 U.S. 306 (1952). In some instances that review has been dispositive of the issue. *Marsh*, 463 U.S. at 792-95. In others it has been an insightful tool in assessing the sensitivity of the conduct in question. E.g., *County of Allegheny*, 109 S. Ct. at 3092; *Lynch*, 465 U.S. at 674-78. Even where the conduct has been ruled unconstitutional, this Court has taken great pains to note that such rulings are not meant to undermine the vital religious heritage and foundation of this country. E.g., *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 212-14 (1963).

Governmental conduct permitting, but not requiring, a non-coercive public school graduation invocation or benediction could not have been conceived by our forefathers

as prohibited by the Bill of Rights. Indeed, our history shows that religious life and education have coexisted to such a degree that to conclude that a graduation ceremony must be held without prayer is inconsistent with our constitutional and historical precepts.

B. Prayer At Public School Graduation Ceremonies Is Constitutional Under Lemon.

In *Lemon v. Kurtzman*, this Court analyzed the constitutionality of two different statutory schemes which provided for state aid to non-public schools. 403 U.S. 602, 607-10 (1971). Generally, the statutes made state aid available for secular subjects in private religious schools, but forbid such aid for religious subjects. *Id.* at 610. The Court held that the statutes in question were unconstitutional because they excessively entangled state government with religion. *Id.* at 607.

The analysis adopted in *Lemon* provided that in order not to violate the Religion Clauses in the Constitution, any state statute must pass three tests. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (citations omitted).

The initial step in applying the *Lemon* analysis to the facts present here is to recognize that unlike *Lemon* this case does not concern the analysis of a statute. However, this Court has indicated that the *Lemon* analysis applies to governmental practices and policies as well as statutes. *County of Allegheny*, 109 S. Ct. at 3100 (practices); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (policies). This case does

not involve a practice or policy analogous to any in which this Court has applied the *Lemon* analysis.² This case involves whether

² Compare *Board of Education of the Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990) (federal statute construed to permit student religious group to meet on school premises); *County of Allegheny*, 109 S. Ct. 3086 (holiday displays on county and city property); *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (federal legislation authorizing grants to religious and other institutions providing teenage sexuality counseling); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Louisiana statute forbidding teaching in public schools of evolution unless accompanied by creationism instruction); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (Washington statute authorizing state commission to grant aid for vocational rehabilitation assistance at a religious college); *Aguillard v. Felton*, 473 U.S. 402 (1985) (federal funds used, *inter alia*, to send public school teachers into religious schools to provide remedial and clinical or guidance services); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (Michigan school district adopting program that provides classes to non-public school students at public expense); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (Connecticut statute that has effect of subsidizing mission of sectarian schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama statute authorizing period of silence for meditation or voluntary prayer); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Massachusetts statute which vests veto power over liquor license applications in churches and schools); *Stone v. Graham*, 449 U.S. 39 (1980) (Kentucky statute authorizing purchase and posting of a copy of the Ten Commandments on the wall of each public school classroom); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (New York statute (continued...)

the voluntary choice, but not mandated use, of an invocation or benediction at public school graduation ceremonies violates the Religion Clauses of the Constitution.

The prohibitions of the Religion Clauses are directed to the government and not private conduct. "[T]here is a crucial difference between government speech endorsing religion which the Establishment Clause forbids, and private speech endorsing religion which the Free Speech and Free Exercise

²(...continued)

authorizing use of public funds to reimburse church sponsored and secular non-public schools for performing various state required services); *Meek v. Pittenger*, 421 U.S. 349 (1975) (Pennsylvania statute providing for state expenditures in connection with education of students in non-public schools); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (New York statute which has effect of subsidizing mission of sectarian schools); *Hunt v. McNair*, 413 U.S. 734 (1973) (South Carolina statutory scheme aiding colleges by using bond financing for non-religious facilities construction); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973) (New York statute providing for reimbursement of expenses incurred in connection with services required by state in non-public schools); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania statute providing funds reimbursing parents for a portion of tuition expenses incurred in sending children to non-public schools).

Clause protect." *Westside*, 110 S. Ct. at 2372. It is necessary at the outset, therefore, to focus on the nature of the governmental action in question.

This case does not involve a state statute or state school board regulation requiring an invocation or benediction at graduation ceremonies. In Rhode Island, as in Delaware and presumably many if not all other states, the day to day operations of the public schools are entrusted to elected local school boards. The local school boards act within broad legal parameters established by the state and federal governments. See *Edwards v. Aguillard*, 482 U.S. at 605; *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 893 (1982) (Powell, J., dissenting). The selection of the faculty and the administration of the school rests with school boards which are subject to recall by

the voters. Del. Code Ann. tit. 14, ch. 10 (1981). Cf. *Lemon*, 403 U.S. at 617-18.

The selection of an invocation and benediction at these Rhode Island schools is a function of the preferences of those involved with the ceremony. Sometimes prayer is included; sometimes it is not. *Respondent's Brief in Opposition to Petition For Writ of Certiorari* at 5. We believe Delaware's circumstances are similar. Neither the choice to allow commencement prayer nor the tradition of permitting such a decision to be made by local school boards can be deemed violative of any portion of the *Lemon* analysis.

Because the nature of Rhode Island's involvement in this case is not statutory or otherwise an affirmative practice or policy, it is difficult to literally apply the *Lemon* analysis in the present case. Notwithstanding that difficulty, it is evident that

Rhode Island's practice survives *Lemon* scrutiny. The decision as to whether to allow graduation prayer to be resolved by the people organizing graduation ceremonies serves the secular purpose of allowing our democratic process to function as intended. Also, graduation prayer itself serves "the secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

The prayer at issue here amply demonstrates that its principal or primary effect neither advances nor inhibits religion. Allowing a practice which has evolved as a historical tradition of the people to continue does not advance religion in any way. On the other hand, to abruptly delete prayer as part of these historically developed

ceremonies would certainly have the effect of inhibiting religion.

Finally, because of the permissive or "hands off" nature of the state involvement, there is no excessive government entanglement with religion by permitting graduation prayer. The school boards face a greater risk of the impermissible entanglement prohibited by Lemon by attempting to enforce the exclusion of the prayer in question than by permitting the present practice of choice to continue. *Widmar*, 454 U.S. at 272 n.11.

This Court considered similar arguments in *Westside* and strongly rejected the Lemon claim that:

because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

110 S. Ct. at 2370. The analysis applicable to equal access for a student religious club applies with equal force to a momentary invocation and benediction at a public school graduation. The Lemon standards are simply not violated.

C. Permitting The Traditional Practice Of Prayer At Graduation Ceremonies To Continue Is Mandated By Marsh.

This Court has refused to "construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 671 (1970) (citing *Everson v. Board of Education*, 330 U.S 1 (1947)). Accordingly, "[t]h[is] Court's interpretation of the Establishment Clause has [consistently]³ comported with what history

³ Lemon and Marsh are consistent in that both opinions relied to some degree on the historical tradition of the practice at issue. In Lemon (continued...)

reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673.

Thus, in *Marsh*, this Court held that a statute which provided for a legislative chaplin, paid by the state, to give an invocation at the beginning of each legislative session was constitutional. 463 U.S. at 792-95. In so holding the Court relied heavily on the historical fact that the tradition of opening legislative sessions with prayer delivered by a paid chaplin originated in the first Continental Congress. *Id.* at 786-87. The Court also placed special emphasis on the fact that Congress voted in favor of the appointment of a chaplin only three days before it

agreed on the final wording of the Bill of Rights. *Id.* at 788.

Hindsight reveals that the *Marsh* decision was an easy case. With regard to prayer at public school graduation ceremonies, however, reference to affirmative approval of the practice by Congress contemporaneous with the adoption of the Constitution appears to be historically impossible. State-established free public schools for the most part did not exist in the late 18th century when the Religion Clauses in the Constitution were adopted. *Wallace*, 472 U.S. at 80 (citing *Abington*, 374 U.S. at 238, and n.7 (Brennan, J., concurring)). Free public schools in Delaware were not created until 1829 when the Delaware General Assembly passed "An Act for the Establish-

³(...continued)

the Court was disturbed by the innovative nature of the statutes in question and the lack of a long history of the practice the statutes sought to establish. *Lemon*, 403 U.S. at 624-25. In *Marsh*, the Court placed heavy emphasis on historical tradition. *Marsh*, 463 U.S. at 786-92.

ment of Free Schools in the State of Delaware."⁴

However, the same principles which guided our founding fathers in the adoption and maintenance of the custom of opening legislative sessions with prayer justify local school boards, if they so choose, in allowing prayer delivered by private citizens at graduation ceremonies to continue. "Marsh stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of

⁴ Although not well established at the time the Constitution was signed, public schools subsidized by taxes existed. A Warrant from Thomas Penn to the Inhabitants of Lewes [Delaware] dated June 23, 1736, established a property tax to support a public school. Although counsel has been unable to locate any concrete evidence to establish that prayer was included in graduation ceremonies at the Lewes School, it is unlikely that the Lewes School differed to any great degree from other schools of the era. Historical records indicate prayer at graduation ceremonies was common. For example, the graduation ceremony of a Swedish school in Delaware on April 8, 1718 was held at the house of John Stalcop in the presence of parents and a pastor. These exercises were opened with prayer by the pastor and with music. W. Powell, *History of Delaware* 384-85 (1928).

the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings." *County of Allegheny*, 109 S. Ct. at 3142 (Kennedy, J., dissenting) (footnote omitted). The Religion Clauses of the Constitution must coexist with deeply rooted historical practices, which in their modern form do not otherwise offend the Constitution.

Any historical analysis of this issue must acknowledge that the public education process in Delaware and the other founding states originated with the various churches. Indeed, in the early days of this country, "[i]ntellectual darkness would have reigned supreme — had not various churches been more alive to the importance of [public schools] than the government." M. Kane, *The Development of Secondary Education in Delaware Before 1900* 13 (1947) (available at the

Delaware Bureau of Archives and Records Management). In Delaware, as in these other states, many churches acted to fulfill the need for public education. Delaware is a true microcosm of the early states in the sense that religious schools started the tradition of graduation ceremonies incorporating prayer. That tradition has survived the establishment of free public schools and for more than 150 years thereafter. See generally Powell, *supra*, at 383-450.

Ironically, despite being established by the various denominations, there is evidence that the early schools in Delaware were established and maintained for primarily secular purposes as required by Lemon. For example, the Newark Academy evolved in the 1730's because of the Presbyterians' concern over "the lack of training for their own clergy as well as leaders for civil life in the Middle Colonies." *Letter of the Trus-*

tees of the Academy of Newark (October 19, 1773) (emphasis added) (available at the Delaware Bureau of Archives and Records Management). The school was open to youths of all religious denominations without distinction. *Id.* The Newark Academy apparently achieved its goal of training civil leaders as well as religious leaders. Graduates included Thomas McKean and George Read, both lawyers who signed the Declaration of Independence. C. Hoffecker, *Delaware A Bicentennial History* 104 (1977).⁵

Since religious schools were the first source of public education in this country, it is such institutions from which we have inherited many traditions, including the graduation ceremony itself. The first

⁵ The curriculum of the early "religious" school was primarily secular. "The Wilmington Friends School, begun in 1748, grew from a curriculum featuring the three Rs to include the classics as the Quakers became more firmly established." Hoffecker, *supra*, at 105.

graduation ceremony in this country took place at Harvard in 1642.⁶ J. Whitehead, *The Rights of Religious Persons in Public Education* 209 (1991) (citing A. Fink, *Evaluation of Commencement Practices in American Public Secondary Schools* 24 (1940)). The ceremony included a prayer given by the president of the institution. *Id.* When commencement exercises originated in public high schools in the 1800s, the high schools generally copied the university format, which included prayer. *Id.* (citing Fink, *supra*, at 20). As the graduation ceremony itself is a vestige of religious history it is not surprising that many parts of the ceremony which have religious significance, such as the processional, the wearing of

robes and prayer, have survived the test of time. See *Id.* at 209-10.

Prayer has been part of graduation ceremonies in Delaware's public schools for more than 150 years. The tradition is well ingrained in the state's colleges and university as well. In 1885 the commencement of Wilmington High School began with a prayer. The commencement of No. 16 High School in 1897 began with prayer and also included a sermon to the graduation class. In 1836 the First Annual Commencement of Newark College (now the University of Delaware) began with a prayer. In 1869 the commencement of the State Normal University included an opening prayer and a benedic-

⁶ All the Ivy League schools except the University of Pennsylvania were started by one religious group or another. *The Rebirth of America* 41 (N. DeMoss ed. 1986).

tion.⁷ The Ephemera Collection (available at the Historical Society of Delaware).

⁷ The tradition of including prayer as part of graduation ceremonies is deeply entrenched in Delaware's history. Records of the Historical Society of Delaware indicate that prayer has been widely accepted as part of commencement exercises in various primary and secondary schools throughout the State of Delaware. The promotion exercises of the William P. Bancroft School in 1947 included an invocation and a benediction. The commencement exercises of the Alexis I. Du Pont School in 1899, the Seaford High School in 1937, the Newark High School in 1938, the Henry C. Conrad School in 1939 and the Georgetown High School in 1962 all included an invocation and a benediction. Likewise, the commencement exercises of Wilmington High School in 1885, 1899, 1900-01, 1911, 1913, 1918, and 1935 all included prayer.

The dedication ceremonies of several schools included prayer. For example both the dedication of the Thomas F. Bayard School in 1925 and the George Gray School in 1926 included an invocation, dedicatory prayer, and a benediction. The dedication of the P.S. du Pont High School in 1935 included scripture reading, invocation, and a benediction. The dedication of the Lombard Elementary School in 1959 included a prayer of dedication and benediction. The dedication of the Evan G. Shortledge School in 1961 also included an invocation and a benediction.

The commencement exercises of Delaware College in 1843, 1845, 1846, 1847, 1848, 1915, 1918, and 1920 all included prayer. The Junior Exhibition of Delaware College in 1846 consisted entirely of prayer and music. The annual commencement of Newark College in 1839 and the commencement of Delaware Women's College in 1918 included prayer. The Ephemera Collection (available at the Historical Society of Delaware).

A brief noncoercive prayer given during the annual commencement of a public school does not violate the Religion Clauses of the Constitution any more than does permitting prayer at the beginning of legislative sessions or allowing the Pledge of Allegiance to be recited in our public schools. All of these traditions are an integral part of the history of this country. "We are a religious people whose institutions presuppose a Supreme Being." *Marsh*, 463 U.S. at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). The prayer traditionally given at high school graduation ceremonies bears a striking resemblance to the acceptable reflections of our religious heritage which we permit to continue in our legislative and judicial ceremonies. Like the prayer and other references to religion included as a part of legislative and judicial ceremonies,

graduation prayer does not violate the Constitution.

II. THE PRACTICE OF PERMITTING PRIVATE INDIVIDUALS TO DELIVER PRAYER AT PUBLIC SCHOOL GRADUATION CEREMONIES COMPLIES WITH THE CONSTITUTIONAL MANDATE THAT GOVERNMENT ACCOMMODATE RELIGION; IT IS NOT STATE SPONSORED ESTABLISHMENT OF RELIGION.

A. Allowing Prayer At Public School Graduation Ceremonies Accommodates Our Diverse Historical Religious Culture.

"In this country, church and state must necessarily operate within the same community." Wallace, 472 U.S. at 69 (O'Connor, J., concurring). The purpose of the Establishment and Free Exercise Clauses of the first amendment is to facilitate the coexistence of the two and "'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.'" Lynch, 465 U.S. at 672 (quoting Lemon, 403 U.S. at 614). "In every Establishment Clause case, [the Court] must

reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Id.* at 672.

The United States Constitution "affirmatively mandates accommodation of religion, not merely tolerance, of all religions and forbids hostility toward any." *Id.* at 673. See Wallace, 472 U.S. at 68-69 (O'Connor, J., concurring) (purpose of Religion Clauses in Constitution is to secure religious liberty). Permitting prayer of the type at issue in this case comports with this mandate.

The practice of permitting prayer at graduation ceremonies, when in many years and in many schools in Rhode Island it is not chosen, does not endorse religion, favor some religion over others or promote reli-

gion. See *County of Allegheny*, 109 S. Ct. at 3100-01. Allowing the continued use of graduation prayer as it has evolved does not convey "a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Westside*, 110 S. Ct. at 2372. Even "[s]econdary school students are mature enough and are likely to understand that a school does not endorse or support . . . speech it merely permits on a nondiscriminatory basis." *Id.*

Rhode Island's practice of allowing but not requiring prayer is one of religious neutrality. Changing policy to affirmatively exclude graduation prayer "would demonstrate not neutrality, but hostility toward religion." *Westside*, 110 S. Ct. at 2371. "[H]ostility toward any religion or toward all religions is as much forbidden by the

Constitution as is an official establishment of religion." *Wallace*, 472 U.S. at 85 (Burger, C.J., dissenting).

To affirmatively outlaw such prayer would convey a message of disapproval of any type of public prayer. If it is simply "tolerable acknowledgement of beliefs widely held among the people of this country" to be able "[t]o invoke Divine guidance on a public body entrusted with making the laws," *Marsh*, 463 U.S. at 792, it seems wholly implausible that traditional graduation prayer celebrating such occasions is improper.

B. The Evils Against Which The Establishment Clause Protects Are Not Implicated By Graduation Prayer.

"Judicial caveats against entanglement must recognize that the line of separation [between church and state], far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances

of a particular relationship." *Lemon*, 403 U.S. at 614. In considering whether to draw the constitutional line to prohibit prayer at public school graduation ceremonies this Court should reference the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz*, 397 U.S. at 668). None of these evils are implicated by allowing the voluntary choice of having, or not having, an invocation and benediction at graduation ceremonies.

The prayer in question occurs in an atmosphere that does not indicate state sponsorship of any specific religion or even religion in general. This case does not involve daily mandatory recitation of government composed prayer in the classroom. Graduation prayer as it has developed pre-

sents a far different case than classroom prayer. Compare *Engle v. Vitale*, 370 U.S. 421 (1962). This is not a case of classroom prayer with its different risks of peer pressure, delivery by school officials, or the fear of daily "indoctrination." See, e.g., *Grand Rapids*, 473 U.S. at 383-85; *Wallace*, 472 U.S. at 60 n.51; *Meek*, 421 U.S. at 369; *Abington*, 374 U.S. at 252-53 (Brennan, J., concurring). Like Presidential Proclamations, graduation prayer is "received in a noncoercive setting and [is] primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination." *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

It is inconceivable that persons perceive the state as giving financial support to religion because a private, unpaid citizen gives a brief prayer during annual commencement exercises. Likewise, as discussed

infra, this case does not involve any active state practice. Graduation benedictions are certainly more innocuous than other more active government involvement previously held to be constitutional. See *Tilton v. Richardson*, 403 U.S. 682 (1971) (federal grants for buildings at church-sponsored colleges); *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) (New York City tax exemption to religious organizations for religious properties); *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947) (New Jersey statute authorizing local school districts to create rule whereby parents are reimbursed for bus transportation of students to parochial schools).

CONCLUSION

Allowing the practice at issue to continue "follows the best of our traditions . . . [and] respects the religious nature of our people . . ." *Zorach*, 343 U.S. at 314. Judicial invalidation of such an innocuous, nonthreatening practice will inevitably send a message of governmental hostility toward all religious practices, regardless of their nature. "[S]uch hostility w[ill] bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Lynch*, 465 U.S. at 673 (quoting *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948)). The casualties of such a war are unpredictable.

It is laudatory and indeed necessary to prevent governmental establishment respecting religion. However, it is repugnant and ill-conceived to conclude that such protec-

tion requires fundamental religious fibers so clearly woven into this country's historical fabric to be torn from our nation's cloth at traditional public school graduation ceremonies.

Respectfully submitted,

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